IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

WEDNESDAY, THE TWENTIETH DAY OF JULY
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE RAMESH RANGANATHAN

WRIT PETITION NO : 21495 of 1994

Between:

Ramesh Watch Company, Park lane, M.G. Road,

Secunderabad, Rep. By its partner, Sri Chandru Chugani,

S/o Gulab Rai, 45 years, Occ: Business, R/o Secunderabad.

..... PETITIONER

AND

1. The Addl. Industrial Tribunal-cum- Addl. Labour Court,

Hyderabad. “Chandra Vihar Buildings”, M.J. Road, Hyderabad.

2. Ch. Bhagwan S/o Nanumanthu, 35 years, R/o H.No. 1-4-27/72/130, Padmasali colony, Venturu-II, Bholakpur, Hyderabad. 380.

(R-2 dismissed as per Court order dt: 4-8-2004 and restored as per Court order in WPMP No. 4968 of 2005 dated 24.2.2005)

.....RESPONDENT

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to call for the records from the 1st respondent and issue a writ, order or direction particularly one in the nature of Writ of Certiorari and quash the order passed by the 1st respondent in M.P. No. 263/87, dated 11.6.1994 allowing the claim of the 2nd respondent for a sum of Rs.7,837/-, holding the same as illegal, unjust, contrary to law and perverse and without jurisdiction and pass such other and further orders as this Hon’ble Court may deem fit and proper in the circumstances of the case.

Counsel for the Petitioner:MR.A.K.JAYAPRAKASH RAO

Counsel for the Respondent No 2: Mr. B.G. Ravinder Reddy.

The Court made the following :

ORAL ORDER:

The order of the first respondent-Additional Industrial Tribunal–cum–Additional Labour Court, Hyderabad
(hereinafter referred to as Tribunal), in MP No. 263 of 1987, dated 11-6-1994, allowing the claim of the 2nd respondent for a sum of Rs.7,837/-, is the subject matter of the challenge in this writ petition.

This Court, in WPMP No. 26691 of 1994 dated 08-12-1994, passed an interim order suspending the award passed by the Tribunal on condition that the petitioner shall deposit half of the amount awarded by the Tribunal within six weeks and that on such deposit it was open to the 2nd respondent to withdraw the same without furnishing any security.

Sri A.K. Jayaprakash Rao, learned counsel for the petitioner, submits that though the amount involved in the writ petition is negligible, only Rs.7,837/-, out of which 50% was deposited by the petitioner and had already been withdrawn by the 2nd respondent herein, it was necessary that the questions of law, which arise for consideration in this writ petition, be decided since several cases of a similar nature are pending both before this Court and the Labour Courts/Industrial Tribunals. In all fairness, learned counsel submits that, irrespective of the result of the writ petition, the petitioner would forego and not make any further claim for the amount already deposited pursuant to the interim directions of this Court, which amount has already been withdrawn by the 2nd respondent.

The brief facts, necessary for the purpose of this writ petition, are that the 2nd respondent herein, (herein after referred to as the “workman”), was appointed as a watch mechanic with the petitioner herein, (hereinafter referred to as employer),
on 20-1-1977. It was his case before the Tribunal that his services were terminated on 10-2-1984 without any notice, compensation and gratuity. The petition filed by him, under Section 33-C (2) of the Industrial Disputes Act (for short ‘the Act’), was for payment of Rs.7,837/- comprised of 1) Rs.675/- towards notice pay of one month, 2) Rs.3,112/- towards gratuity for 8 years under the A.P. Shops and Establishments Act, 3) Rs.2,700/- towards retrenchment compensation for 8 years and
4) Rs.1,350/- towards 2 months salary as penalty for not paying gratuity within time,

under the A.P. Shops and Establishments Act.

The employer contended before the Tribunal that the petition filed by the workman, under Section 33-C (2) of the Act, was analogous to execution proceedings and hence was not maintainable and that the workman had no right to claim any amount since his services had not been terminated. The Employer further contended that the workman had worked for four years only, at a monthly salary of Rs.625/-, and that he had to pay Rs.1,200/- to the Employer towards the balance amount of loan taken earlier and when the Employer insisted, the workman suddenly left the services of the Employer in the 2nd week of December, 1984, without intimation. The allegation that the workman had worked from 20-11-1977 on a monthly salary of Rs.675/- was denied contending that this submission was made only to show that he had worked for more than five years to enable him to claim gratuity. It was further contended that the workman had opened a shop of his own at Tupran and was carrying on his own business. The Employer contended that since the services of the workman had neither been terminated nor retrenched, the workman was not entitled to either retrenchment compensation or gratuity. It was further contended that the petition filed by the workman, after a lapse of three years, was only at the instigation of some of the other employees and was barred by time.

No documentary evidence was let in by either of the parties. The workman examined himself as W.W.1 and the Managing Partner of the Employer was examined as M.W.1.

While the workman contended that he worked from
20-1-1977 till 10-12-1984 on a monthly salary of Rs.675/-, the Employer contended that the workman had worked only from May 1981 till December 1984 on a monthly salary of Rs.625/-. The workman contended that his services were terminated as he joined as a member of the union. The employer, on the other hand, contended that the workman had abandoned his services on the employer demanding repayment of the loan taken earlier and that there was no termination of the services of the workman.

The Tribunal noted that both the parties had failed to let in any documentary evidence, that they had examined themselves as witnesses, and it was a case of oath against oath. Taking note of the admission made by the Managing Partner of the petitioner firm, (who was examined as M.W.1), that he had maintained

attendance registers and wage registers, the Tribunal held that since these registers were not filed into Court, an adverse inference had to be drawn against the employer and the contention of the workman was required to be accepted. The Tribunal further held that if the employer had filed the attendance register and had shown that he had marked the workman absent for some time and had later removed his name from the attendance register, it could have been held that the workman had himself absconded from duty, that it was not a case of termination and since the employer did not file the attendance register the case of the workman that his services were terminated by the employer had to be accepted.

On coming to the conclusion that the services of the workman were terminated, the Tribunal held that he was entitled to service benefits under the Industrial Disputes Act and the A.P. Shops and Establishments Act. Section 40(1) of the A.P. Shops and Establishments Act, 1966, which corresponds to Section 47(1) of the A.P. Shops and Establishments Act, 1988, provided that no employer could terminate the services of a workman without reasonable cause and required the employer to issue one month's notice or pay one month wages in lieu of notice in cases where the services of an employee, who had worked for a period of not less than six months, was sought to be terminated. Further under Section 41 of the A.P. Shops and Establishment Act, 1966, the employer had to pay gratuity amounting to 15 days average wages for each year of continuous employment when the employee had been in employment continuously for a period of not less than 5 years. The Tribunal held that since the services of the workman were terminated in the year 1984, he was governed by the A.P. Shops and Establishments Act, 1966. Under Section 25-F of the Industrial Disputes Act, a workman was entitled to one month's notice and for retrenchment compensation equivalent to 15 days average pay for every completed year of continuous service and that under Section 40(2) of the A.P. Shops and Establishments Act, 1966, for non payment of gratuity, the workman was entitled to two months wages. The Tribunal held that since the services of the workman were terminated without notice and without following the provisions of the A.P. Shops and Establishments Act and the Industrial Disputes Act, the workman was entitled to the amount claimed in the petition. The petition, as filed in MP 263 of 1987, was allowed and the Employer was directed to pay an amount of Rs.7,837/- to the workman herein within one month from that day failing which the workman was held entitled to interest at 12% p.a.

Sri A.K. Jayaprakash Rao, learned counsel for the petitioner, challenges the said order of the first respondent on the following grounds:

1. Since the termination of the workman itself was in dispute, the petition, under Section 33-C (2) of the Act, was not maintainable and the dispute relating to termination of a workman could only be adjudicated in proceedings under Section 10 or under Section 2(A) (2) of the Industrial Disputes Act or under Section 51 of the A.P. Shops and Establishments Act, 1988.

2. Initial burden was on the workman, who had approached the Tribunal seeking relief, to establish that his services were terminated and such burden ought not to have been fastened on the employer.

3. The claim of two months salary for non payment of gratuity under the A.P. Shops and Establishments Act, 1966, was liable to be rejected since a similar provision under the A.P.Shops and Establishment Act, 1988, was held to be ultra vires.

In support of his first submission that the Tribunal did not have jurisdiction, Sri A.K. Jayaprakash Rao, learned counsel for the petitioner relied on the judgment in ***Municipal Corporation of Delhi vs. Ganesh Razak and another*** wherein the Supreme Court held:

The High Court has referred to some of these decisions but missed the true import thereof. The ratio of these decisions clearly indicates that where the very basis of the claim or the entitlement of the workman to a certain benefit is disputed, there being no earlier adjudication or recognition thereof by the employer, the dispute relating to entitlement is not identical to the benefit claimed and is, therefore, clearly outside the scope of a proceeding under Section 33 C (2) of the Act. The Labour Court has no jurisdiction to first decide the workmen's entitlement and then proceed to compute the benefit so adjudicated on that basis in exercise of its power under Section 33 C (2) of the Act. It is only when the entitlement has been earlier adjudicated or recognized by the employer and thereafter for the purpose of implementation or enforcement thereof some ambiguity requires interpretation that the interpretation is treated as incidental to the Labour Court's power under Section 33 C (2) like that of the Executing Court's power to interpret the decree for the purpose of its execution.

Sri A K Jayapraksh Rao, learned counsel for the petitioner, contends that the Tribunal had no jurisdiction to decide the workmen's entitlement and then proceed to compute the benefit since it is only when the entitlement has been earlier adjudicated or recognized by the employer, for the purpose of implementation or enforcement thereof, would the Tribunal have jurisdiction under Section 33C (2) of the Act like that of the executing Court's power to interpret the decree for the purpose of its execution. Learned counsel further contends that since the workman's

entitlement would only arise after it was determined that his services were terminated and since this dispute regarding termination of the services of the workman could not have been adjudicated by the Tribunal, in a petition under Section 33C (2) of the Act, the order of the first respondent, in holding that the workman's services were terminated, that he had not absconded from duty, and that he was entitled for payment of notice pay, gratuity, service compensation etc., is without jurisdiction.

On the other hand, Sri B.G. Ravinder Reddy, learned counsel for the 2nd respondent, relies on the judgment of a Full Bench of this Court in ***Mandegam Radhakrishna Reddy vs. Sri Bharathi Velu Bus Service*** in support of his contention that the Tribunal is not precluded from exercising its jurisdiction under Section 33 C (2) of the Industrial Disputes Act and examining this jurisdictional fact, as to whether the services of the workman had been terminated by the Employer, or whether the workman had absconded from duty, since determination of this jurisdictional fact is incidental to the powers conferred on Tribunals/Labour Courts under Section 33 C (2) of the Industrial Disputes Act. Learned counsel further submits that if the contention advanced on behalf of the petitioner was to be accepted, then in every case, such a dispute could be raised, rendering the very provision, in Section 33-C (2) of the Industrial Disputes Act, illusory and redundant.

In **Ganesh Razak's** case (1 supra), the daily rated casual workers of Delhi Municipal Corporation had claimed the same pay as was being paid to regular employees, on the principle of 'equal pay for equal work' since they were discharging the same work as regular employees. The very basis of this claim was disputed by the Municipal Corporation. There was no adjudication or recognition of the claim earlier. Since the dispute relating to entitlement was not incidental to the benefit claimed of parity in pay with regular employees, the Supreme Court held it to be outside the scope of proceedings under Section 33-C(2) as the Tribunal/Labour Court had no jurisdiction to first decide the workman's entitlement and then proceed to compute the benefits to be adjudicated, in exercise of its power under Section 33-C(2) of the Industrial Disputes Act.

It is well settled that mere denial, of an existing right, by the employer does not take away the jurisdiction of the Industrial Tribunal/Labour Court to entertain a petition under Section 33-C(2) of the Industrial Disputes Act. While the right itself

should be an existing right for enabling a workman to maintain a petition under Section 33-C(2), it is not necessary that this existing right should have been admitted by the employer. The denial of the existing right of the workman to receive money or the benefits neither ousts the jurisdiction of the Industrial Tribunals/Labour Courts to entertain a petition under Section 33-C of the Industrial Disputes Act nor does it require reference, of the Industrial Dispute raised, for adjudication under Section 10 of the said Act. Denial of the right would only require Tribunals/Labour Courts to enquire into the fact whether the right is existing. The Labour Court, has jurisdiction to decide and determine this jurisdictional fact. The enquiry under Section 33-C(2) in such cases would have to be preceded by an enquiry into the existence of the right and such an enquiry is incidental to the main determination which has been conferred on the Labour Court under Section 33-C(2) of the Industrial Disputes Act (***Divisional Enginer, M.R.T. Operation City Circle, A.P.S.E.B. Hyderabad v Ikram Ahmed and Anand Oil Industries v. Labour Court, Hyderabad.***

In Radhakrishna Reddy's case (2 supra), the workman was driving a bus which met with an accident. While the workman contended that he reported for work the next day, the employer contended that the workman's driving licence was seized by the police on the date of the accident, that the workman had gone away without informing the management, had abstained from duty then onwards and it was nearly thee years thereafter on his acquittal in the criminal case that the workman had reported for duty. The Labour Court rejected the plea of the employer as one without substance. The Full Bench of this Court held that by mere denial, the jurisdiction of the Labour Court to enquire into the matter would not be excluded and that the Labour Court had rightly enquired into the jurisdictional fact as to the existence of the workman's right to the claim made by him.

I see considerable force in the submission of

Sri B G Ravinder Reddy, learned counsel for the 2nd respondent, that the Tribunal is not precluded from examining the jurisdictional fact as to whether the services of the workman had been terminated by the employer or whether the workman had absconded from duty, as determination of this jurisdictional fact is essential for exercise of, and incidental to, the power conferred on the Tribunal under Section 33-C(2) of the Industrial Disputes Act. While it is true that proceedings under Section 33 C (2) of the Act are akin to execution proceedings, the Tribunal has the incidental power to examine this jurisdictional fact while determining the amount payable to a

workman, in an application filed under Section 33 C (2) of the Industrial Disputes Act. The contentions of Sri A.K.Jayaprakash Rao, learned counsel for the petitioner, is therefore to be rejected.

Insofar as the third contention, regarding payment of two months wages as penalty for non payment of gratuity is concerned, Sri A K Jaya Prakash Rao, learned counsel for the petitioner, relies on the judgment in ***Srinivasa Resorts Limited, Hyderabad and another vs. State of A.P. Labour, Employment and Factories, (Lab-I) Dept. and another*** wherein a Full Bench of this Court declared as unconstitutional Section 47(3) and (4) of the A.P. Shops and Establishments Act, 1988. Section 47(3) provided for payment of service compensation to employees on their rendering one year service and Section 47(4) provided for payment of wages even after cessation of service till service compensation is actually paid. The Full Bench of this Court held these provisions to be in violation of Articles 14 and 19(1) (g) of the Constitution of India. Learned counsel submits that Section 40(3) of the A.P. Shops and Establishments Act, 1966 is similar to Section 47(4) of the A.P Shops and Establishments Act, 1988 and since Section 47 (4) of the A.P. Shops and Establishments Act 1988 has been declared *ultra vires,* a similar provision under Section 40(3) of the 1966 Act cannot be made the basis for directing payment of two months wages as penalty for non payment of gratuity.

I am afraid I cannot agree with this submission. The validity of Section 40(3) of the A.P. Shops and Establishments Act, 1966 did not arise for consideration before this Court nor is there any challenge thereto in the present writ petition. It is well settled that there is a presumption in favour of the constitutionality of statutes and till such a provision is declared, by constitutional courts, to be *ultra vires* it remains valid and enforceable ***(M.L. Kamra v New India Assurance Co.)***. Since Section 40(3) of the A.P. Shops and Establishments Act, 1966 has not been so invalidated, the order of the first respondent in directing payment of two months wages under Section 40(3) of the A.P. Shops and Establishments Act on its finding that the services of the workman had been illegally terminated, cannot be said to be invalid.

The question which remains to be considered is whether the Tribunal was justified in holding that the services of the workman had been illegally terminated. There is substantial force in the contention of Sri A K Jaya Prakash Rao, learned counsel for the petitioner, that initial burden lies on the workman to establish that his

services were terminated and that it was not open to the Tribunal to thrust the initial burden in this regard on the employer. Learned counsel relies on the judgments of the Supreme Court in ***Municipal Corporation, Faridabad vs. Siri Niwas, M.P. Electricity Board vs. Hariram and Range Forest Officer vs. S.T. Hadimani*** in support of this contention. In Siri Niwas case (7 supra), the question which arose for consideration was as to whether the workman had worked for a period of 240 days within one year and had complied with the requirements of Section 25-B of the Industrial Disputes Act, a prerequisite for holding that termination of his service was in violation of Section 25(F) of the said Act. In this case the Tribunal noticed that neither the management nor the workman had cared to produce the muster rolls which was their joint liability and further observed that the workman did not even summon the same although the management had not produced the muster roll. The Supreme Court, on examining the said award of the Industrial, Tribunal took note of the fact that the workman, apart from examining himself in support of his contention, did not produce or call for any documentary evidence from the office of the employer including the muster rolls, nor did he show the terms and conditions of his offer of appointment, or evidence regarding remuneration received by him for the work he did during the said period and that the workman did not even examine any other witness in support of his case. The Supreme Court, while holding that the burden of proof was on the workman, upheld the award of the Tribunal.

This judgment in ***Siri Niwas*** case was followed in ***M.P Electricity Board*** (8 supra) wherein the Supreme Court drew adverse inference and held that the workman had not discharged the burden of establishing the fact that he had worked for 240 days and that both the Tribunal and the High Court had erred in directing reinstatement of the workman. In ***S.T. Hadimani's*** case, (9 supra), the Supreme Court held thus:

> "…….In our opinion the Tribunal was not right in placing the onus on the Management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his

favour and that cannot be regarded as sufficient evidence for any Court or Tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside ……"

Sri B.G.Ravinder Reddy, learned counsel for the second respondent, relies on the Judgment in ***H.D. Singh Vs. Reserve Bank Of India*** wherein the Supreme Court, while taking; note of the fact that the relevant records which the workman wanted to be filed had not been produced by the management, held that in the absence of any evidence to the contrary, the court had necessarily to draw an adverse inference that the Employee had worked for more than 240 days.

Learned counsel also relies on the judgment in ***K. Chandramma vs. Labour Court-I, Hyderabad*** , wherein a Division Bench of this Court held

"……We do not propose to elaborate further on the above, except because to our mind occurs yet another principle which in cases like one in hand should be applied is the doctrine called "res ipsa loquitur" which is a rule of evidence generally applied to accidents, but nonetheless is of great value in weighing evidence in all such cases where the evidence is under exclusive control of the opposite party. Under this doctrine, when a thing which cause injury, without fault of injured person, is shown to be under exclusive control of opposite party and injury is such as in ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, and in absence of an explanation, that injury arose from no fault of the opposite party, the Court would presume in favour of the injured".

Sri B.G.Ravinder Reddy, learned counsel for the 2nd respondent submits that the Judgment of the Supreme Court in ***H.D. Singh's*** case was not brought to the notice of the Supreme Court in any one of the three judgments relied upon on behalf of the petitioners. Sri A.K.Jayaprakash Rao, learned counsel for the petitioner, on the other hand, submits that since the Judgment in ***H.D. Singh's*** case was rendered by a two Judge bench and as all the three Judgments relied upon by him are of co-ordinate benches and are later in point of time, the latter judgments prevail. In this context reference may be made to the judgment of a Full Bench of five Judges of the Karnataka High Court in ***"Govindanaik v. West Patent Press Co***. and the judgment of a Division Bench of the Bombay High Court in ***"Vasant Tatoba Hargude v Dikkaya Muttaya Pujari*** wherein it has been held that if two decisions of the Supreme Court, on a question of law, cannot be reconciled and if both benches of the Supreme

Court consist of equal number of judges, the latter of the two decisions should be followed by the High Court and other Courts. Reference may also be made to a Full Bench of this Court in ***"Government Of A.P. v N.V. Choudary*** wherein it was held that if the High Court is confronted with the judicial dicta and obiter dicta contained in two different judgments of the Supreme Court, the High Court is bound necessarily by the judicial dicta

It is not, however, necessary to examine this aspect since the workman herein, except examining himself, in support of his plea that his services were terminated, neither produced any documentary evidence nor did he seek a direction to summon records including the muster rolls from the office of the employer, nor did he choose to examine any other witness, not even a co-employee, in support of his plea that his services had been terminated by the Employer. Initial burden of establishing his plea of termination undoubtedly lies on the person who approaches the Court seeking relief. In ***H.D. Singh's*** case (10 supra), relied upon by the learned counsel for the 2nd respondent, the Hon'ble Supreme Court drew an adverse inference against the management for its failure to produce the records, since the workman had wanted the relevant records to be filed. In the present case, however, no attempt was made by the workman even to have the relevant records, with the employer, summoned. While it was also open for the employer to produce evidence in support of its contention that the workman had abandoned service and that his services were not terminated, in the absence of the initial burden of establishing that his services had been terminated, not being discharged by the workman, this initial burden cannot be fastened on the Employer. In view of the subsequent judgments of the Supreme Court in ***Hadimani's*** case (9 supra), ***Sri Nivas's*** case (7 supra) and ***Hariram***' case (8 supra), reliance can no longer be placed on a contrary view taken by the Division Bench of this Court in ***Chandramma's*** case (11 supra). The Tribunal has clearly erred in placing this initial burden of proving that the workman's services had not been terminated and that he had abandoned service, on the Employer and in holding that the employer, despite possessing the best evidence i.e. the attendance register, had not chosen to produce it and therefore an adverse inference had to be drawn against the employer.

Since the workman had failed to discharge the burden of establishing the fact, that his services had been terminated and that he had not abandoned service, and since this jurisdictional fact forms the foundation of the entire claim of the workman, the

order of the Tribunal in M.P.No.263/87 dated 11-6-1994 allowing the claim of the workman for a sum of RS.7837/-, is liable to be set aside.

The oral undertaking of Sri A.K. Jayaprakash Rao, learned counsel for the petitioner, that the petitioner would forego and not make any future claim for the amount deposited by it pursuant to the interim order passed by this Court which amount has already been withdrawn by the 2nd respondent, is made part of the record.

The writ petition is accordingly allowed. There shall be no order as to costs.

20-07-2005 RAMESH RANGANATHAN,J.

asp/Kvsn

Note:
L.R. Copy to be marked

To

One fair copy to the Hopn'ble Mr. Justice Ramesh Ranganathan, (for his lordship's) kind perusal).

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2. Two CD copies.

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